

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE BLOOMINGTON CITY COUNCIL**

In Re: The Matter of the
City of Bloomington,

vs.

Fat Tuesday – MOA,
Limited Partnership

**FINDINGS OF FACT
AND CONCLUSIONS**

This matter came on for hearing before Administrative Law Judge Barbara L. Neilson on April 25-26, 2000, at 10 West 95th Street in the City of Bloomington, Minnesota. Daniel J. Biersdorf and E. Kelly Keady, Attorneys at Law, Biersdorf and Associates, 33 South Sixth Street, Suite 4100, Minneapolis, Minnesota 55402, appeared on behalf of the Licensee, Fat Tuesday – MOA, Limited Partnership. Sandra Henkels Johnson, Associate City Attorney, City of Bloomington, 2215 West Old Shakopee Road, Bloomington, Minnesota 55431-3096, appeared on behalf of the City of Bloomington. The record closed on June 14, 2000, when the Administrative Law Judge received the last post-hearing brief.

This Report is not a final decision. The City Council of the City of Bloomington will make the final decision after reviewing this Report and the hearing record. The City Council may adopt, reject or modify these Findings of Fact and Conclusions. The parties will be permitted to file a written response to this Report with the City Council within ten (10) days after the Report is received by them. In addition, both parties will be afforded an opportunity to address the City Council when the matter is scheduled before the Council. The parties should contact the Bloomington City Council, 2215 West Old Shakopee Road, Bloomington, Minnesota 55431, tel.: (612) 948-8782, to find out how to file their written response to the Report with the City Council or how and when to present argument to the City Council concerning this matter.

STATEMENT OF THE ISSUES

Fat Tuesday – MOA, Limited Partnership, holds a liquor license in the City of Bloomington. The City alleges that Fat Tuesday violated provisions of the Bloomington City Code and Minnesota Statutes regulating the sale of alcoholic beverages on March 7, 2000, by permitting or encouraging patrons to expose their breasts and other private parts during a Mardi Gras celebration on that date. The City now proposes to revoke the Licensee's liquor license. Fat Tuesday – MOA, Limited Partnership, contends that the violations were not willful and that license revocation is too harsh a penalty. The

specific issues presented include (1) whether conduct in violation of the Bloomington City Code and Minnesota Statutes regulating the sale of alcoholic beverages in fact occurred at the Fat Tuesday located in the Mall of America on March 7, 2000; and (2) whether Specialty Restaurant Management, Inc./Tab Cat, Inc., doing business as Fat Tuesday – MOA, Limited Partnership, is properly held responsible for the conduct of local management and the activities that occurred on that date.

Based upon the record in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Background Information

1. Fat Tuesday – MOA, Limited Partnership (“Fat Tuesday – MOA”) is owned and operated by its general partner, Specialty Restaurant Management, Inc. (“SRM”). Its limited partner is Tab Cat, Inc. Both SRM and Tab Cat are owned and controlled by Spencer Jerome Stuart and Robert E. Lee Stuart, Chief Executive Officers, and have their offices at 3999 Austell Road, Suite 303, PMBC, Austell, Georgia 30106. Fat Tuesday – MOA’s address, as listed on its 1999 liquor license renewal application, is 2135-D Defoor Hills Road, Atlanta, Georgia 30318. Fat Tuesday – MOA has contracted with SRM to perform its management responsibilities. Tab Cat acts as a special limited partner and is an equity partner.^[1]

2. SRM and Fat Tuesday – MOA have entered into a management agreement whereby SRM is responsible for formulating all policies and procedures to be utilized by Fat Tuesday – MOA in training its managers, as well as conducting and operating all facets of the Fat Tuesday – MOA business. In addition, SRM is responsible for providing such additional advice and services as shall be necessary to “manage” the facility, including such field inspections as are reasonably necessary to insure that the managers and supervisory personnel are properly implementing the policies and procedures specified by SRM.^[2]

3. SRM currently operates two bar/restaurants called Fat Tuesday in Arizona and one at the Mall of America. It also operates a restaurant called Cripple Creek Tap House and Grill in Duluth, Georgia.^[3]

4. SRM/Tab Cat doing business as Fat Tuesday – MOA was licensed under Article III of the Bloomington Alcoholic Beverage Control Ordinance at all times relevant hereto and has held state and local on-sale intoxicating liquor licenses for the premises at 407 East Broadway, Mall of America, Bloomington, Minnesota, since 1992. It has operated a bar/restaurant in the leased premises since June 1993. The licensed facility consists of 4,700 square feet and is capable of serving 300 patrons, with seating capacity for 146. The state and local liquor licenses issued to Fat Tuesday – MOA were signed by John Render on behalf of SRM.^[4]

5. Spencer Jerome Stuart, Lee Stuart, and Sandy "Sam" Cleary are employed by SRM in the Atlanta, Georgia, area.^[5] Jerome Stuart is in charge of the operations and marketing efforts for all of the restaurants. He hires and oversees the training of all management personnel and makes periodic visits to the restaurants to interact with general managers in the local restaurants.^[6] Lee Stuart hands the administrative aspects of the company, such as the legal, accounting, bookkeeping, and record-keeping functions, assisted by Sam Cleary, who collects weekly and daily financial information from the restaurants, interacts with SRM's outside accounting firm, issues various training manuals and general forms, holds training sessions with management personnel, and is generally responsible for human resources functions.^[7]

6. Between approximately December 1998 and March 2000, SRM personnel (Jerome Stuart, Lee Stuart, or Sam Cleary) visited Fat Tuesday at the Mall of America (hereinafter referred to as the "Bloomington Fat Tuesday") five times. An area manager from the Phoenix and Tempe market visited the Bloomington Fat Tuesday one time in December 1998. Jerome Stuart usually telephoned the local general manager at least once a week and often three or four times a week, and Ms. Cleary usually called more than once a week.^[8]

7. During 1998, the general manager of the Bloomington Fat Tuesday was Darryn L. Maloney.^[9] At the time of the 1999 Mardi Gras celebration, the general manager of the Bloomington Fat Tuesday was Jim Cuniff. Richard Dittberner and Troy Gore were the assistant managers.^[10] In March of 2000, the general manager of the Bloomington Fat Tuesday was Julio Pitre. Mr. Pitre had previously served as a general manager for Fat Tuesday from approximately 1995-97. Richard Dittberner and Kyle Kauffman were the assistant managers. All three of them were present at the Bloomington Fat Tuesday at various points during the evening of March 7, 2000.^[11]

8. The Bloomington Fat Tuesday experienced decreasing sales during 1999 and also over the prior three years. Its 2000 Mardi Gras celebration was a part of its strategy to improve sales, as it is every year.^[12]

9. "Fat Tuesday" is the last day before the commencement of the Lenten season on Ash Wednesday, and has traditionally been an opportunity to have one last chance for frivolity and to engage in whatever activity an individual may be giving up for Lent.^[13] In New Orleans, Mardi Gras celebrations include parades and the throwing of trinkets or beads from the parade floats to the crowd. Jerome Stuart acknowledged that the traditional Mardi Gras in New Orleans had evolved by the early 1990's to include a certain level of debauchery and lewdness. He further recognized in the early 1990's that "the spontaneous activity of our customers was getting to a higher level that we really couldn't accept."^[14]

10. The Fat Tuesday bar/restaurants have always incorporated the bead throws in their celebration by having staff get up on tables or the bar and throw the beads to the crowd. Fat Tuesday locations typically have king cakes, face painters, clowns, and magicians at their Mardi Gras parties. Fat Tuesday employees are encouraged to have their faces painted or dress up in costumes, and New Orleans

music is played to introduce the bead throws. Live entertainment or disc jockeys are used to create a festive, “street party” atmosphere.^[15]

11. For a period of time during the 1980’s, managers of various Fat Tuesday locations encouraged the display of breasts. Beginning in the early 1990’s and particularly in 1997, SRM engaged in discussions with Fat Tuesday managers to attempt to get them to stop encouraging such displays.^[16] In 1997, SRM made it clear to its Fat Tuesday locations, including the Bloomington location, that “special beads” did not require “favors” and that customers who exposed themselves should first be warned and then, if there were a repeat violation, be escorted off the premises.^[17] Mr. Stuart discussed this policy with Mr. Pitre.^[18]

12. The SRM approach referenced above was prompted at least in part by the fact that the Fat Tuesday located in Tempe, Arizona, was cited after Mardi Gras in 1997 by the Tempe police because of incidents involving the exposure of breasts. After the citation was issued, SRM personnel met with the Tempe Police Department to discuss the situation. They worked out a plan that involved the posting of signs that discouraged the behavior and let the patrons know that such behavior was not going to be allowed, and instituted the policy of an initial warning and later expulsion if patrons persisted. Off-duty policemen are used in Tempe to try to control the crowd, and signs are posted saying that nudity is not encouraged or allowed. The Tempe authorities are satisfied with the way in which the Tempe Fat Tuesday is handling the situation.^[19]

13. Toward the end of January, 2000, Ms. Cleary completed her revision of the Fat Tuesday Manager’s Handbook and the Fat Tuesday Manager’s Training Guide and visited the Bloomington Fat Tuesday to discuss the revised handbook and guide with managers at that location.^[20] The revised Manager’s Handbook specifies that “[t]hrows are trinkets tossed from the floats to the crowds. These include: beads, doubloons, cups and other specialty items. As a tradition during Mardi Gras, the better the “throw” the more “favors” will be displayed to receive it.” The use of the word “favors” in the revised handbook implies the display of exposed breasts. Ms. Cleary overlooked this language when revising the handbook and should have deleted it.^[21] In addition, the policy to first warn patrons who expose private parts and then eject them if they persist is not set forth in the revised Manager’s Handbook. Mr. Stuart plans to revise the Manager’s Handbook to include a written policy concerning this type of activity.^[22] Finally, the revised Manager’s Handbook does not specifically warn of disciplinary action for managers who are found to have encouraged or permitted lewd behavior on the premises. It does, however, specify that “[i]mproper or illegal conduct will not be condoned and will result in immediate termination.”^[23] The revised Manager’s Training Guide requires that independent contractors must submit an invoice and be paid from accounts payable.^[24] The on-site management at the Bloomington Fat Tuesday signed acknowledgments that they had reviewed the Manager’s Handbook and Manager’s Training Guide and would follow the policies in them.^[25]

14. The Bloomington Fat Tuesday began a three-month promotion with radio station K-102 in January, 2000, in an effort to promote the food aspect of Fat Tuesday, create a positive image that would reach out to families as a whole, and increase lunch

business in particular. This marketing campaign was endorsed by SRM and cost approximately \$30,000. Each month of the campaign had its own theme: football in January, basketball in February, and Mardi Gras in March. Fat Tuesday put together a program with the Mall of America including Family Fun Day participation and activities in the Mall's rotunda during the weekend before Mardi Gras and on March 7, 2000. The activities included bands, materials for the making of masks by children, bead tosses, food sampling, and a parade around the mall for children for which Fat Tuesday rented two actual Mardi Gras floats and walking heads and costumes.^[26]

15. The Tuesday celebration during Mardi Gras is generally a high sales night and is promoted by Fat Tuesday.^[27] Sales totals were similar during the 1999 and 2000 Mardi Gras celebrations at the Bloomington Fat Tuesday^[28] No one from SRM was present during the 1999 or 2000 Mardi Gras celebrations at the Bloomington Fat Tuesday.^[29]

Events Leading Up to Mardi Gras 2000 at the Bloomington Fat Tuesday

16. On February 7, 2000, a memorandum was sent to all Fat Tuesday general managers, including the Bloomington location, by Claire Gisclair, a Louisiana employee of the licensor of the Fat Tuesday concept. The memorandum stated as follows:

As we approach Mardi Gras, I must once again remind you that our customers may have their own interpretations of what Mardi Gras should be, especially if they have ever celebrated 'Fat Tuesday' on Bourbon Street in New Orleans. Our staff should neither encourage nor condone lewd behavior and IT IS A VIOLATION OF COMPANY POLICY for employees to engage in or promote any such activity.

Management should always be alert to any conduct that might be considered offensive to customers and employees.^[30]

Jerome Stuart also faxed this memorandum to all Fat Tuesday managers.^[31]

17. On February 15, 2000, a promotional outline regarding the March 2000, Mardi Gras celebration was faxed to Fat Tuesday managers by Jerome Stuart. The goals set forth in the promotional outline included "[r]ecreat[ing] the New Orleans Mardi Gras experience at each of our units," "[i]ncreas[ing] sales during the Mardi Gras promotional period," and "[d]oubl[ing] sales at each unit on Fat Tuesday, March 7th." The outline included information concerning the history of Mardi Gras and Fat Tuesday, the history of the king cake, and information on where to obtain king cakes and beads. The promotional outline, in discussing bead throws, stated in bold type: **"Employees should stand on tabletops and bartops and throw beads in order to be highly visible. PLEASE NOTE: Special beads DO NOT require 'favors'. Please, use your best judgment and stay within the boundaries of good taste. This CANNOT be emphasized ENOUGH with your staff!!!!!!"** The promotional outline included a Management Response Form and a promotional outline to be completed by each

location. Mr. Kauffman went over the promotional outline with Mr. Pitre. There was no discussion of Charles Rutherford, the emcee they had hired for the 2000 Mardi Gras celebration, in the promotional outline pertaining to the Bloomington location. ^[32]

18. On March 1, 2000, Jerome Stuart e-mailed a memorandum to the Mall of America managers and general managers. This memorandum stated in pertinent part:

As always, your stores will be filled with customers who want to trade beads for certain favors from other patrons, and as you know we do not condone nor do we allow this type of behavior to take place at our locations. Please make sure that the proper signage is posted in plain public view that discourages this type of lewd behavior.

The memorandum concluded by providing telephone numbers at which Mr. Stuart could be reached. ^[33]

19. By letter dated March 3, 2000, Roger B. Willow, Chief of Police of the Bloomington Police Department, notified Mr. Pitre at Fat Tuesday in Mall of America and John Render, President of the Corporate General Partner in Austell, Georgia, of the City's concerns about the up-coming Mardi Gras celebration. The letter stated as follows:

It has come to the attention of the City of Bloomington that during Fat Tuesday's Mardi Gras celebration last year, several women were encouraged by your agent or employee to come up on stage and completely expose their breasts. In exchange for this sexual display, the women were given trinkets by that employee or agent. At least a portion of this display was captured on videotape. Recently, the City has been made aware of the fact that a similar Mardi Gras celebration may be planned for next week.

Sexual displays of this sort constitute a direct violation of several sections of City Code and state statute. The sanctions for these violations range from misdemeanor penalties of \$700.00 and/or 90 days in jail to suspension or revocation of your liquor license as well as civil fines of up to \$2,000.00. I would also draw your attention to the more general requirement of §13.48(d) of City Code which specifically states you are responsible for the conduct of the business and that you are also responsible for maintaining sobriety and order at your business. Enclosed are copies of applicable state and local laws.

A violation occurs even where the person encouraging, aiding or abetting the prohibited conduct or display is only a temporary employee or agent. As a licensed establishment, every act or omission by an employee or independent contractor of the licensee constituting a violation shall be attributable to the licensee if such act or omission occurs either with the authorization, knowledge or approval of the licensee or as a result of the

licensee's negligent failure to supervise the employee's or independent contractor's conduct.

It is the purpose of this letter to put you on notice of the 1999 violation and that the City intends to closely monitor the operation of your establishment for any further violations. The City will avail itself of all possible sanctions if a violation is discovered. The City's Licensing Division and City Attorney's office (civil and criminal divisions) have been made aware of this situation and are prepared to take appropriate action.

It is the expectation of the City that you, as the manager of this licensed establishment, will take all appropriate steps to assure that no violation of City ordinance or state law occurs. Should you have any questions or concerns about the City's position, please do not hesitate to contact either myself at 952-948-8701 or Sandra Johnson of the Bloomington City Attorney's office at 952-948-3895.^[34]

At the time the letter was sent, John Render was no longer employed by SRM. He had previously served as the office manager and worked with Lee Stuart on banking matters. He left SRM in September 1999. Jerome Stuart did not receive a copy of the letter until March 9, 2000, two days after the Mardi Gras celebration. The letter was postmarked March 6, 2000.^[35] It is evident, however, that Mr. Pitre received his copy of the letter prior to the March 7, 2000, Mardi Gras celebration.^[36]

20. Charles Rutherford II served as the emcee of the 1999 Mardi Gras celebration at the Bloomington Fat Tuesday and was hired to host the Mardi Gras celebration at the Bloomington Fat Tuesday again in 2000, despite the warning letter from the Police Chief, because he was popular, well-known, and well-liked.^[37] Mr. Pitre confirmed with Mr. Rutherford that he wanted him to emcee the 2000 celebration.^[38] He was told that he would be doing the same kind of things, announcing events and emceeing during the evening, but was not told specifically what to do.^[39] He was told about the letter from the police concerning the events of 1999. Mr. Pitre paraphrased the letter but did not read it to Mr. Rutherford.^[40] When Mr. Rutherford arrived on March 7, he read a portion of the letter from the police and then asked Mr. Pitre what it said. Mr. Pitre said that the same things could go on but could not be encouraged by employees or affiliates of Fat Tuesday. Mr. Rutherford interpreted that to mean that he would not be able to pick people out of the crowd and try to talk them into coming up on stage.^[41] He was told that the 2000 celebration had to be more "hands off" and that he could not touch a patron or physically encourage them by lifting up shirts, and could not say, "You need to show us this to get this."^[42] Mr. Rutherford was not told what he was supposed to do if someone went ahead and exposed their breasts, buttocks, or other private parts.^[43]

21. On Saturday, March 4, 2000, the Bloomington Fat Tuesday received promotional posters for the Mardi Gras celebration. Mr. Kauffman began putting them on the windows of Fat Tuesday on Sunday, March 5, 2000, and finished displaying them on Monday, March 6, 2000.^[44] Posters were placed on the outside of Fat Tuesday

for other occasions during the year as well.^[45] The posters completely obscured the windows to the front hallway but not the windows out to Knott's Camp Snoopy. The staff of the Bloomington Fat Tuesday also cleared out all of the chairs and tables in preparation for the March 7 celebration and set up beer tubs in various locations inside the establishment.^[46] A sign was posted near the door to Fat Tuesday stating that "nudity was not encouraged." The sign did not state that nudity was not permitted or that patrons violating the rule would be asked to leave.^[47]

Events of March 7, 2000

22. A meeting of employees of the Bloomington Fat Tuesday was held at 5:00 p.m. on March 7, 2000, to go over the game plan for the evening. Employees were told that encouragement of patrons exposing private parts was not condoned. They were also told that Fat Tuesday management did not condone the exchange of beads for bare breasts. Employees were told to eject patrons who engaged in fighting or violent activities. Mr. Dittberner did not tell Fat Tuesday employees what to do if patrons exposed their private parts.^[48] Mr. Kauffman informed employees that they were supposed to remove people who were exposing their private parts.^[49] Mr. Kauffman also heard Mr. Pitre tell employees on a one-on-one basis that they should be kicking people out for exposing themselves.^[50]

23. The Bloomington Fat Tuesday employed six security people dedicated to the inside of the establishment, five people assigned to the door, and Mr. Dittberner to assist in the 2000 Mardi Gras celebration.^[51] Security employees were told that, if people got out of control, such as engaging in fighting or being violent, they should be brought to the nearest door and door personnel would help throw them out. They were not asked to bring people who exposed themselves to the nearest door person and have them ejected.^[52] During the prior year (1999), the Bloomington Fat Tuesday employed a total of six security people for the Mardi Gras celebration. After the 1999 Mardi Gras celebration, then-general manager Jim Cuniff informed Jerome Stuart that there had been a problem with crowd control. Mr. Stuart spoke with Mr. Pitre before the 2000 celebration about having more security on hand and making sure not to let more people in than were actually leaving the premises.

24. Persons wishing to gain admittance to the Bloomington Fat Tuesday during the evening of March 7, 2000, had to pay an \$8.00 cover charge.^[53]

25. Thomas Schauer, an undercover detective with the Bloomington Police Department, was assigned to go to the Bloomington Fat Tuesday and attend the March 7, 2000, Mardi Gras celebration. He was accompanied by Dustin Stendel, another detective. They were told to monitor the situation and see what type of activity was going on and assess whether it was merely generated by patrons or whether it was something that Fat Tuesday seemed to be facilitating or orchestrating. Detectives Schauer and Stendel arrived at the Bloomington Fat Tuesday before 7:00 p.m.^[54] Detective Schauer drank three beers during the course of the evening.^[55]

26. Kristi Lindgren and Misty Bahr, Mall of America Security Department employees, also were assigned to observe the behavior at the Bloomington Fat Tuesday on March 7, 2000. They arrived at approximately 7:15 p.m. About 25 people were lined up outside Fat Tuesday at that time. Ms. Lindgren brought a camera with her.^[56]

27. During the evening of March 7, Ms. Lindgren, who was primarily in the south end of the Bloomington Fat Tuesday, saw breasts, buttocks, and vaginal areas exposed and saw breasts and buttocks touched. She did not observe any Fat Tuesday employees approach the people who were exposing themselves.^[57] Ms. Lindgren also observed a male pulling down his pants and showing the crowd his buttocks and a woman attempting to expose her vaginal area.^[58] Some of the exposures of private parts witnessed by Ms. Lindgren occurred while the individuals were standing in a window that faced out to Knott's Camp Snoopy. There were no posters on that window.^[59]

28. Ms. Bahr observed a man who was standing on the south end of the bar expose his genitalia. She did not see any Fat Tuesday employees approach him or attempt to stop him. Although he was near a window that faced Camp Snoopy that was not covered with posters, he had his back to the camp.^[60] Ms. Bahr also saw exposures of females' breasts.^[61] The exposures started a little before 8:00 p.m. and continued periodically during the rest of the night until the bar was closed.^[62]

29. Prior to 8:00 p.m., Detective Schauer observed two women in Fat Tuesday expose their breasts while standing on an elevated area near the southern end of the bar, while the crowd chanted encouragement.^[63]

30. By 8:00 p.m., there was a crowd of about 300 customers inside Fat Tuesday, and approximately 200 persons were waiting in line outside to get in. Door hosts were attempting to regulate the number of persons entering, allowing new persons inside only when a patron left. The other bar-restaurants on the fourth floor of the Mall of America did not have lengthy lines.^[64]

31. At approximately 8:00 p.m., Mr. Rutherford got up on the DJ box in the southwest end of the bar and was handed a microphone. Mr. Rutherford asked the patrons whether they had been at Fat Tuesday's during the 1999 Mardi Gras celebration. Most of the patrons responded with cheers. Mr. Rutherford told them that they had received a letter from the police in response to the 1999 party. The crowd booed. Mr. Rutherford then advised the crowd of the contents of the March 3, 2000, letter from Chief Willow warning of prohibited activity. He paraphrased the letter and said that everyone in Fat Tuesday would be clothed in normal Mall of America attire and that under no circumstances would there be any showing of excessive skin or breasts. His tone was satirical and mocking. While he was talking, a man and woman, A.B. and K.S., stood on the platform next to him wearing Fat Tuesday T-shirts. As Mr. Rutherford mentioned the prohibited conduct, the man and woman removed their shirts, the woman removed the tank top she was wearing under her shirt, and the man fondled the woman's bare breasts, which were exposed to the crowd. The patrons responded with

cheers. During this demonstration, Fat Tuesday employees were nearby, but took no action to prevent the display.^[65]

32. A.B. and K.S. were friends of Mr. Rutherford. Mr. Rutherford had asked them ahead of time to participate in the demonstration and had asked either Julio Pitre or Richard Dittberner to provide them with Fat Tuesday T-shirts.^[66] Prior to the demonstration, Mr. Rutherford asked Mr. Dittberner about doing it. Mr. Dittberner told Mr. Rutherford that he did not want to make that decision, and told Mr. Rutherford to ask Mr. Pitre for permission. When Mr. Rutherford told Mr. Pitre about his planned demonstration, Mr. Pitre laughed and liked the idea. He did not tell Mr. Rutherford not to do it.^[67]

33. After the demonstration with A.B. and K.S., Mr. Rutherford informed the crowd that they would be throwing out the beads shortly. He said, "You know what those are for, guys," and used his hands to motion lifting up his shirt.^[68]

34. Shortly thereafter, Mr. Rutherford pointed to a woman who was in the crowd and motioned her to come up. After talking to him for a short time, she dropped her pants. She was wearing thong-type underwear and exposed her buttocks. After some coaxing from the crowd and more conversation with Mr. Rutherford, she lifted up her tube top and fully exposed her breasts.^[69]

35. Mr. Rutherford knew most of the women who came up on stage and had a sense that they would be open to exposing themselves and dancing with each other. He called a couple of women who were friends of his as "ringers" to set the tone for the crowd. One of these women is an exotic dancer who dances topless in her performances.^[70]

36. Mr. Rutherford never told any of the women who came up on stage that it was prohibited for them to show their nude breasts or other private parts to the crowd, but also did not tell them that it was required. The crowd chanted, "Take it off" and "Skin to win" to the women who went up on stage.^[71]

37. No Fat Tuesday employees told Mr. Rutherford to stop what he was doing on March 7, 2000.^[72]

38. These and similar activities continued during the next three hours. Mr. Rutherford and Fat Tuesday security employees encouraging some people to come up on stage, while others went up on their own. They exposed their breasts and buttocks and lifted their skirts to expose their vaginal areas. Mr. Rutherford sprayed whipped cream on women's breasts, buttocks, and pubic areas. He licked the whipped cream off of women's bare breasts and buttocks. Women also licked whipped cream off of other women's body parts.^[73] On a few occasions, Mr. Rutherford got behind women on the platform in a dancing fashion and then lifted up their tops as the crowd chanted.^[74]

39. As women got up on the bar area, the male patrons reached up and touched bare breasts and buttocks.^[75] Some women did not seem to mind while others took swings at the men and told them to stop.^[76] On a few occasions, Fat Tuesday

bartenders leaned across the bar and told patrons to relax and keep their hands off the women.^[77] Detective Schaur observed a man reach up and finger the vagina of a woman who pulled her skirt up and was not wearing underwear.^[78]

40. Mr. Rutherford was paid \$150 in cash for his performance at the Bloomington Fat Tuesday in 2000, the same amount as he was paid in 1999.^[79] The budget shown to SRM did not show that Mr. Rutherford would be a paid person involved with the celebration. However, Mr. Cuniff did state in the Mardi Gras recap provided to SRM in 1999 that he had “hired a co-MC to fire up the crowd.” He also told Mr. Stuart that he needed to hire an emcee to communicate with the crowd, announce bead throws, and announce specials because the normal DJ used at the location had no personality. Mr. Rutherford was paid out of proceeds from the cover charge, in violation of company policy.^[80]

41. A uniformed Bloomington police officer spoke to Mr. Dittberner outside the Bloomington Fat Tuesday twice during the evening of March 7, 2000, and raised concerns about whether there would be a repeat of the year before. He also expressed safety and capacity concerns about the number of persons present in the facility.^[81]

42. The crowd in Fat Tuesday on March 7, 2000, was mostly men. It was literally standing room only; everyone was standing shoulder to shoulder. There were approximately 15 to 20 men for each woman in the establishment.^[82]

43. Food service at Fat Tuesday was limited between 7:00 p.m. and closing on March 7, 2000, although it is possible that food would have been served if requested. Employees and others were present in the kitchen during the evening.^[83]

44. At certain irregular intervals throughout the evening, employees of the Bloomington Fat Tuesday employees tossed beads to the crowds. Mr. Rutherford announced the bead tosses. The beads were given to women in the crowd and up on the stage to reward them for exposing themselves. This exchange occurred within view of Fat Tuesday employees and they did not respond in any way or do anything about it.^[84]

45. Mr. Kauffman threw a few people out for exposing themselves, rowdiness, and attempting to fight. A bartender called security over when a man attempted to expose himself while standing on a ledge that ran along the back wall and asked the security person to escort the man outside. Although Mr. Kauffman did not see Bloomington Fat Tuesday employees who were on the regular payroll kick people out for exposing their private parts, he did see security staff hired from outside do so.^[85] Mr. Kauffman saw women pull down or pull up their shirts to expose their breasts. When he was in the vicinity, he removed them. He witnessed additional exposures from across the bar.^[86]

46. Mr. Dittberner saw “partial” exposures of patrons’ breasts, buttocks, and vaginal areas on March 7, 2000. He spent most of the night working around the door area. He did not take action because the exposures he saw were in the middle of the

bar, the bar was packed, and he believed the individuals involved would have been gone by the time he reached the middle of the bar.^[87]

47. Mr. Dittberner understood that it was improper and could result in termination if a Fat Tuesday employee encouraged patrons to expose themselves or touched them. He was not told by Mr. Pitre or anyone else in management a specific protocol as to how to handle situations in which people exposed their private parts, and could not recall if they were actually told to kick out patrons who exposed themselves.^[88]

48. By 9:00 p.m., Detective Schaur determined that some of the violations they had been looking for were occurring and there was a need to stop what was going on. The crowd was getting rambunctious, touching was occurring, a couple of the women seemed very uncomfortable, people were continuing to drink, and he was concerned that things might get worse. Detective Schaur did not observe any Fat Tuesday employees try to stop the exposures and fondling. He was concerned that women would have things done to them without their consent. He was also concerned about people urinating in the bar and the potential for fights. Because the Bloomington police did not have sufficient people to close down Fat Tuesday's at that point in a safe manner, it was decided to wait until the shift change at 11:00 p.m. The City held over the officers that were working and used later shift personnel to assist with closing the bar.^[89]

49. As the evening progressed, trash (cans and bottles), water, and urine was on the floor. Detective Schaur observed a man urinating next to the bar. An altercation occurred at approximately 10:00 to 10:30 p.m. during which Fat Tuesday security employees took a man up against one of the beer tubs and caused water to spill all over the floor.^[90] This was the only fight that Detective Schaur observed.^[91] Between approximately 10:00 and 10:30 p.m., a man got up on the platform, took his shirt off, and dropped his pants.^[92]

50. During the latter part of the evening, Ms. Lindgren noticed that there was vomit in the hallway to the women's restroom and water on the floor of the restroom. There wasn't any toilet paper in the restroom and one of the sinks did not work. Men were also present in the women's restroom.^[93]

51. Fifteen to twenty uniformed officers closed down the Bloomington Fat Tuesday at approximately 11:00 p.m. on March 7, 2000.^[94]

Post-Mardi Gras Events

52. The Bloomington Police Department executed a search warrant on the premises of the Bloomington Fat Tuesday on March 8, 2000. The police recovered two videotapes showing the Mardi Gras celebrations at the Bloomington Fat Tuesday in 1999 and 1998. Mr. Pitre told Detective Schaur that a videotape had been made of the March 7, 2000, celebration as well but said that it was not at the bar at that time. He said he would try to get it for him. Mr. Pitre never provided Detective Schaur with a

copy of the 2000 videotape.^[95] The Fat Tuesday Promotional Budget/Expense Sheet for March 7, 2000, includes \$150.00 for "Sound/Lights/Video."^[96]

53. The 1998 and 1999 videotapes were kept in an unlocked cabinet that holds the stereo/video equipment and cable. They were stored with sound tapes that were kept to back up the satellite or cable sound system used in the Bloomington Fat Tuesday. Although anyone could have had access to the cabinet, only management and bar staff were authorized to control the music and television. Individuals from SRM could have obtained access to the videotapes. However, because the satellite or cable sound system was used at the Bloomington Fat Tuesday, the area where these tapes were located really was not accessed much at all. Neither Mr. Stuart nor Ms. Cleary were aware of the existence of the videotapes or of the activity depicted in the videotapes. Mr. Stuart had never seen the videotape for 1999 until he viewed it in mid-March of 2000 in connection with his investigation and preparation for the hearing in this matter. As of the date of the hearing, he still had not reviewed the 1998 videotape.^[97]

54. The videotape of the 1999 Mardi Gras celebration at the Bloomington Fat Tuesday shows the same emcee (Mr. Rutherford) and essentially similar activity to that which occurred during the 2000 Mardi Gras celebration at Fat Tuesday. Mr. Rutherford was hired by the then-general manager of Fat Tuesday's Mall of America location and was also paid \$150 for his work that year.^[98] A number of people exposed themselves that year as well.^[99] Mr. Rutherford asked people to come up on stage and asked female patrons to expose their breasts. At times, he stood behind women and lifted up their shirts (at their request).^[100] During the 1999 celebration, none of the Fat Tuesday employees told Mr. Rutherford that he should have stopped assisting people in exposing their bare breasts.^[101] Mr. Rutherford also applied whipped cream in 1999 to bare breasts and buttocks, while the crowd cheered, yelled, and threw beads.^[102] The Fat Tuesday general manager later told Mr. Rutherford that the evening was a success and he was sure that everyone had a good time.^[103] Both Mr. Pitre and Mr. Dittberner were present at the Bloomington Fat Tuesday during the 1999 Mardi Gras celebration, although Mr. Pitre was not employed by Fat Tuesday at that time.^[104]

55. The videotape of the 1998 Mardi Gras celebration at Fat Tuesday also shows women exposing their breasts.^[105] Mr. Rutherford was not the emcee during 1998.^[106]

56. On March 8, 2000, Mr. Pitre called Jerome Stuart and informed him that the police had closed down the Bloomington Fat Tuesday the night before and had just come on the premises and confiscated certain items, including a tape of the 1999 Mardi Gras celebration. He told Mr. Stuart that he thought the tape could incriminate them. That was the first time that Mr. Stuart learned of improper conduct at the Bloomington location and the first time he learned of the 1999 videotape. Mr. Stuart came to Minnesota shortly thereafter and conducted an investigation into what had happened. He concluded that there was sufficient evidence that company policy had been violated and that he had no choice but to terminate Mr. Pitre's employment. There is no evidence that any other Fat Tuesday employees were disciplined for not attempting to stop the multiple exposures of private parts that occurred on March 7.^[107] Mr. Dittberner

quit his job at Fat Tuesday on March 17, 2000, to pursue his career.^[108] Mr. Kauffman also quit his job during the last week of March, 2000.^[109] Jerome Stuart has hired a new manager, Bob Gilbertson, for the Bloomington Fat Tuesday.^[110]

57. Mr. Rutherford testified as part of a plea agreement in a criminal case in which he pled guilty to the single charge of promoting or procuring indecent conduct. He was told by the prosecutor in that case that they would consider giving him a stay in the imposition of sentence if he would provide complete and truthful testimony in the present case.^[111]

58. A criminal complaint charging Mr. Pitre with permitting prohibited adult entertainment in a licensed liquor establishment in violation of Bloomington City Code 13.48.01, operation of a sexually oriented business without a license in violation of Bloomington City Code 14.335 and 14.336, and permitting a public nuisance in violation of Minn. Stat. § 609.475 was signed by Hennepin County District Court Judge Tanya Kozicky on March 10, 2000.^[112]

59. Prior to March 8, 2000, Jerome Stuart had no indication from the on-site management of the Bloomington Fat Tuesday or from Mall of America management that there had been any kind of problem in connection with the Mardi Gras celebrations. Although the Mall of America management contacted SRM in writing from time to time between February 1999 and March 8, 2000, they did not notify anyone employed by SRM that there had been a problem with Fat Tuesday's Mardi Gras celebration in 1999. The only call placed to SRM by Mall management was made on March 6 or March 7, 2000, and noted a concern with Fat Tuesday's placement of posters in the windows of its premises.^[113]

60. If Jerome Stuart had been aware of the situation at the Bloomington Fat Tuesday, he would have requested a meeting with the City and the Mall of America. He also would have contacted the City of Bloomington's Police Department and requested off-duty police to try to control the situation. He has taken that approach in Tempe and in Atlanta when a Fat Tuesday bar/restaurant was located there. He plans to take these steps in the future.^[114]

61. As of the date of the hearing, the Bloomington Fat Tuesday had never been cited for a violation of any kind during the seven years it had leased space at Mall of America.^[115] There also is no evidence that the City of Bloomington has previously considered disciplining the liquor licenses held by the Bloomington Fat Tuesday.

62. The Bloomington City Council referred this matter to the Office of Administrative Hearings so that a full and complete record could be developed in front of an objective and neutral Administrative Law Judge.^[116] In response to an inquiry from the Administrative Law Judge, the Associate City Attorney clarified by letter dated July 13, 2000, that the City requested that the Administrative Law Judge issue Findings of Fact and Conclusions of Law but leave the issue of the discipline to be imposed entirely to the discretion of the City Council, as was done in a previous liquor license matter heard by the Office of Administrative Hearings for the City of Bloomington.^[117]

63. The Notice of Hearing in this matter was filed on March 27, 2000, and indicated that the hearing would be held on April 25-26, 2000. The hearing went forward as scheduled.

64. Prior to the hearing, the Licensee filed a Motion in Limine and Objection to Non-Public Data being Received into Evidence. By letter order dated April 24, 2000, the Administrative Law Judge denied the Licensee's motion in limine and determined that it would not be proper to exclude evidence used to establish the existence of a violation or limit the admission of evidence to that which is relevant to prove willfulness on behalf of the Corporate Licensee. The Administrative Law Judge also denied the Licensee's request that evidence offered at the hearing be deemed to be non-public or confidential data and that the hearing be closed to the public. The Judge ruled that other matters discussed during the prehearing conference, such as the impact of prior City Council liquor license disciplinary cases and whether the Corporate Licensee properly may be held responsible for the acts of local management of Fat Tuesday, should await further evidence, argument, and briefing by the parties.

65. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

66. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Minnesota law^[118] gives the Administrative Law Judge and the Bloomington City Council authority to conduct this proceeding, to consider whether the Licensee's liquor license should be revoked or otherwise disciplined, and to make findings and conclusions, and recommendations or orders on that subject.

2. The City gave the Licensee proper and timely notice of the hearing in this matter, and the City has complied with all of the law's substantive and procedural requirements.

3. Minnesota law gives municipalities the authority to regulate the licensing of establishments serving liquor within their jurisdictions, subject to certain statutory limitations^[119] and possible judicial review.^[120]

4. The City of Bloomington is a municipality within the meaning of the state's municipal planning and zoning legislation.^[121]

5. Minn. Stat. § 340A.415 states in pertinent part as follows:

On a finding that the license or permit holder has . . . failed to comply with an applicable statute, rule, or ordinance relating to alcoholic beverages, the commissioner or the authority issuing a retail license or permit under [Chapter 340A of the Minnesota Statutes] may revoke the license or permit, suspend the license or permit for up to 60 days, impose a civil penalty or up to \$2,000 for each violation, or impose any combination of these sanctions. No suspension or revocation takes effect until the license or permit holder has been given an opportunity for a hearing under sections 14.57 to 14.69 of the Administrative Procedure Act. This section does not require a political subdivision to conduct the hearing before an employee of the office of administrative hearings. Imposition of a penalty or suspension by either the issuing authority or the commissioner does not preclude imposition of an additional penalty or suspension by the other so long as the total penalty or suspension does not exceed the stated maximum.

6. Pursuant to Minn. Stat. § 340A.501, “[e]very licensee is responsible for the conduct in the licensed establishment and any sale of alcoholic beverage by any employee authorized to sell alcoholic beverages in the establishment is the act of the licensee for the purposes of all provisions of this chapter except sections 340A.701, 340A.702, and 340A.703 [relating to felonies, gross misdemeanors, and misdemeanors].”

7. The City bears the burden to show by a preponderance of the evidence that a violation of Minnesota Statutes or City Ordinances has occurred and that disciplinary action against the Licensee’s license or imposition of a civil penalty is warranted.

8. The Bloomington City Charter specifies that the control of the sale of intoxicating liquor is vested in the City Council, subject to and in accordance with the City Charter and the laws of the State of Minnesota. The City Charter directs the Council to prescribe by ordinance “detailed rules and regulations governing the issuance of licenses and cancellation thereof and the sale and consumption of intoxicating liquor” and further prescribe penalties for violations.^[122]

9. The Bloomington City Charter authorizes the City Council to “establish by ordinance a procedure for imposing a civil penalty not exceeding \$2,000 for each violation of a city ordinance” and requires that “[t]his procedure must provide an opportunity for the accused to be heard by a neutral party, which may be the city council.”^[123]

10. The Bloomington City Council has adopted an Alcoholic Beverage Control ordinance governing the sale and consumption of alcoholic beverages. See City Code Chapter 13. The provisions relating to intoxicating liquor are set forth in Article III of Chapter 13.^[124] The ordinance specifies, among other things, that “[a] licensee under this Article shall be responsible for the conduct of the business being operated and shall maintain conditions of sobriety and order.”^[125] The ordinance also contains a finding by

the City Council that “the sale and/or presence of alcoholic beverages by the drink and adult entertainment occurring on the same premises can increase disorderly conduct and can result in incidents of prostitution, public masturbation, indecent exposure, and/or sexual assault.”^[126] The same provision goes on to state:

In order to protect the health, safety, and welfare of City residents, and pursuant to the City Council's authority to regulate alcoholic beverages under Minnesota Statutes, Chapter 340A and the Twenty-first Amendment to the U.S. Constitution, no licensee shall permit the following kinds of conduct on the licensed premises or in areas adjoining the licensed premises where the following kinds of conduct can be seen by patrons of the licensed premises:

- (1) The performance of acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, or flagellation; or
- (2) The actual or simulated touching, caressing, or fondling of the breast, buttocks, anus, or genitals; or
- (3) The actual or simulated displaying of the pubic hair, anus, vulva, or genitals; or
- (4) The displaying of films depicting the acts described in (1)-(3) above; or
- (5) The presentation of any female in such manner or attire to expose to view any portion of the breast below the top of the areola, or any simulation thereof.^[127]

11. Bloomington City Code §13.55 authorizes the City Council to “revoke a license, suspend a license for up to sixty (60) days, impose a civil penalty of up to \$2,000 for each violation, or impose any combination of these sanctions for a violation of: (1) a provision of this Article; (2) a state law relating to alcoholic beverages; or (3) a state or local law relating to moral character.” This provision further specifies that such disciplinary actions must be preceded by written notice to the licensee and a public hearing, the licensee must receive at least eight days’ advance notice of the hearing, and the nature of the charges against the licensee must be provided in the notice.^[128]

12. The City proved by a preponderance of the evidence that the Licensee permitted the following kinds of conduct to occur on the licensed premises on March 7, 2000, in violation of Bloomington City Code 13.48.01: the performance of simulated acts of sexual intercourse, masturbation or oral copulation; the touching, caressing or fondling of the breast, buttocks, anus or genitals; the displaying of pubic hair, anus, vulva or genitals; and the presentation of females with their breasts fully exposed. The City also proved by a preponderance of the evidence that the same violations occurred at the Licensee’s Mardi Gras celebration in 1999 and that the presentation of females

with their breasts fully exposed occurred at the Licensee's Mardi Gras celebration in 1998.

13. The City did not prove by a preponderance of the evidence that the Licensee violated a state or local law relating to moral character. In this regard, the City alleged that the Licensee violated Minn. Stat. § 617.23 relating to indecent exposure, which makes it a misdemeanor for a person to "procure another to expose private parts" in a public place or in any place where others are present. The Administrative Law Judge concludes that the City has not shown by a preponderance of the evidence that SRM/Tab Cat d/b/a Fat Tuesday – MOA possessed the requisite intent in its Mardi Gras celebrations in 1998, 1999, or 2000 to violate the indecent exposure criminal statute. The City has not shown that it is proper to impute to SRM/Tab Cat d/b/a Fat Tuesday – MOA any criminal intent that its individual agents or employees may have possessed in this regard.

14. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

15. The bases and reasons for these Conclusions are those expressed in the Memorandum that follows, and the Administrative Law Judge incorporates that Memorandum into these Conclusions.

Dated: July 14, 2000

BARBARA L. NEILSON
Administrative Law Judge

NOTICE

The City Council is requested to serve its final decision upon each party and the Administrative Law Judge by first-class mail.

MEMORANDUM

The City of Bloomington has brought disciplinary action against the existing liquor license of Fat Tuesday - MOA based on violations of statute and City Code that occurred at the bar-restaurant during the 2000 Mardi Gras celebration.^[129] The Licensee has admitted that violations did occur in the Licensee's leased premises on March 7, 2000.^[130] The Licensee, however, denies that these violations were willful and disagrees with the City as to the proper standard and burden of proof to be applied in assessing the sanction to be imposed. In addition, the Licensee contends that it is inappropriate to hold it responsible for the actions of local management who, it is contended, violated company policy on the occasion of the Mardi Gras celebrations at the Bloomington Fat Tuesday.

At the commencement of the hearing, the Administrative Law Judge noted that the Bloomington City Code did not address the allocation of the burden of proof in liquor license proceedings^[131] and indicated that, unless counsel objected, it would be her intention to place the burden on the City in this case.^[132] The City agreed that it should have to show that revocation or other adverse action against the Licensee was appropriate by a preponderance of the evidence.^[133] The Licensee argued at the hearing, however, that the City should have to make the showing by clear and convincing evidence. The Judge invited the Licensee to address this issue in its post-hearing brief,^[134] but the Licensee did not do so.

Minn. Stat. § 340A.415 specifies that a liquor license holder is entitled to a hearing subject to the provisions of the Administrative Procedure Act before suspension or revocation of the license may occur. The rules adopted by the Office of Administrative Hearings under the Administrative Procedure Act specify that the party proposing that certain action be taken bears the ultimate burden of persuading the finder of fact that the evidence supports the requested action.^[135] The OAH rules further specify that the standard of proof required for administrative hearings is “a preponderance of the evidence, unless the substantive law provides a different burden or standard.”^[136] Accordingly, in actions where a public agency or body is seeking to revoke or discipline a license held by the opposing party, the burden of proof is typically placed on the public agency or body to show by a preponderance of the evidence that the disciplinary action is justified.^[137] No different burden or standard of proof is required by the governing statute and ordinances in this matter. Absent a different standard of proof, the preponderance standard applies in this case. Therefore, it is concluded that the burden of proof is on the City of Bloomington to establish by a preponderance of the evidence that the Licensee violated Minnesota statutes or City ordinances and that disciplinary action against the license is warranted.

The Licensee argues that, in prior license disciplinary matters, the City has imposed revocation only in instances where the violation has been determined to be “willful.” Consequently, the Licensee contends that, absent a showing of a willful violation on the part of Fat Tuesday - MOA, revocation of its license is inappropriate. The City argues that it has the authority to impose discipline up to and including revocation and that no city ordinance or state statute requires a finding of willfulness as a necessary prerequisite to imposing revocation. The Licensee’s claim that a finding of willfulness is required before revocation may be imposed is based on the City Council’s bifurcated voting pattern in a discrete number of underage sales cases. In these cases, the Council voted first as to the existence of a violation and second as to whether the violation was willful.^[138] The City asserts that a former attorney in the City Attorney’s Office erroneously determined that a finding of a willful violation was necessary before revocation of a license could be imposed. The City points out, however, that neither the governing ordinance nor statute makes willfulness the exclusive basis for license revocation. Consequently, the City maintains that it should not be bound by its past incorrect interpretation of the law. Instead, the City contends that the issue in this case is whether or not the continuation of the license is detrimental to the public welfare. The City argues that the particular factors that the Council should consider include the

egregiousness of the violation, whether it was continuing in nature, how pervasive the violation was, the atmosphere in which the violation was committed, and whether it was willful as opposed to inadvertent or careless.

Municipal authorities have broad discretion to issue, regulate and revoke liquor licenses.^[139] There is no requirement in statute or ordinance that the City establish that the license violation was willful before imposing revocation. The City's past practice of seeking revocation only in cases of willful violations does not require the City to demonstrate willfulness in this matter. Municipalities are not bound by prior erroneous applications of their ordinances.^[140] The Bloomington City Council has the authority, pursuant to Chapter 340A of the Minnesota Statutes, to regulate the sale of alcoholic beverages. Inherent in the right to control the sale of liquor is the power to regulate the activities on the licensed premises.^[141] When considering whether to take disciplinary action against a liquor license, the Minnesota Supreme Court has found that it is the city council's duty to decide whether the licensee has been guilty of such unlawful conduct in the operation of his business that the continuance of the license is "detrimental to the public good."^[142] And, in an analogous case, the Court noted that the purpose behind the licensing of the sale of intoxicating liquor is to protect and promote the public health, safety, morals, and welfare.^[143]

The Bloomington City Code specifically requires that, "[i]n order to protect the health, safety and welfare of City residents . . . no licensee shall permit [sexually explicit or lewd] conduct on the licensed premises"^[144] Based on the wording of its ordinance and the authority provided under the state Liquor Law (Chapter 340A), it is appropriate for the Bloomington City Council to look beyond willfulness and consider generally whether the continuation of the Licensee's liquor license would be detrimental to the public welfare. Case law involving other municipal liquor license proceedings has also upheld the revocation of liquor licenses based on evidence that the establishments involved have been operated in such a manner as to endanger the public health, safety and welfare.^[145] Accordingly, it is concluded that the City of Bloomington's past incorrect interpretation that a "willful" violation was required before revocation could be imposed does not estop the City from applying the public health, safety and welfare standard currently urged by the City in the instant matter. The specific factors proposed by the City for consideration in applying this standard (i.e., the severity of the violation, whether it was continuing in nature, how pervasive the violation was, the atmosphere in which the violation was committed, and whether it was willful as opposed to inadvertent or careless) are logically related to the determination of whether continuance of the license will affect the health, safety, and welfare of City residents.

It is abundantly clear in this case that the local management at the Bloomington Fat Tuesday failed to exercise meaningful control over the conduct of the patrons and the entertainment on March 7, 2000. They hired Mr. Rutherford for a second year,^[146] failed to provide him with adequate guidance concerning permitted activities, and failed to intervene in any way when he proceeded to encourage displays of nudity. It is difficult to understand why local management acted as it did, particularly in light of the stern warning Fat Tuesday had received from the Bloomington Police Department and

the certainty that police were monitoring the events of March 7. Although some employees removed patrons who exposed their breasts, buttocks, or genitalia, their actions were sporadic and of limited effectiveness given the size and intoxication level of the crowd and the fact that Mr. Rutherford continued to encourage this behavior.

The Licensee argues that it should not be held responsible for the events that occurred at the Bloomington Fat Tuesday because the Licensee had no knowledge of the improper conduct prior to its occurrence. The Licensee asserts that it instructed its local Fat Tuesday managers to keep the Mardi Gras celebrations within the boundaries of good taste and to first warn, then remove any patrons who exposed their private parts. In addition, the Licensee emphasized in several memoranda to local management of the Bloomington Fat Tuesday prior to the Mardi Gras event that it did not condone or encourage lewd behavior and that such behavior was deemed to be a violation of company policy. The Licensee maintains that the local management of the Bloomington Fat Tuesday acted outside the scope of its employment by allowing the prohibited behavior to occur and continue on its premises. According to the Licensee, local management at the Bloomington Fat Tuesday failed to eject patrons as instructed and allowed the behavior on the premises to get out of hand. The Licensee contends that the local managers' misconduct should not be imputed to the SRM/Tab Cat d/b/a Fat Tuesday – MOA where such misconduct was in direct violation of company policy. In other words, the Licensee maintains that it should not be held responsible for the intentional misconduct of "rogue" local managers.

Both the Bloomington City Code and the Minnesota Liquor Act make it the responsibility of the Licensee to maintain order in the premises at all times. Pursuant to Minn. Stat. § 340A.501, "[e]very licensee is responsible for the conduct in the licensed establishment" and any sale of an alcoholic beverage by any employee is the act of the licensee for the purposes of the Act with the exception of the provisions relating to felonies, gross misdemeanors, and misdemeanors. Likewise, the Bloomington City Code states that a "licensee . . . shall be responsible for the conduct of the business being operated and shall maintain conditions of sobriety and order."^[147] And the Bloomington City Code prohibits licensees from permitting sexually explicit conduct, performances, or presentations on the licensed premises.^[148] In light of these provisions, it appears that, for the most part, liquor licensees are to be held strictly responsible for activities on the licensed premises, and it is questionable whether traditional agency principles should be applied.^[149]

Even assuming, arguendo, that it is appropriate to consider traditional agency principles, the Administrative Law Judge is not convinced that the Licensee in the present case may avoid responsibility for the conduct of its local management. A general rule in agency law is that notice to, or knowledge of, an agent is notice to, or knowledge of, the principal, and binding on the latter.^[150] A principal will be liable for the unlawful conduct of an agent where the conduct is within the scope of the agent's employment.^[151] Liability follows only upon a finding that the unlawful act was within the scope of the agency.^[152] Thus, the Minnesota Supreme Court has held that a principal is not liable for the unauthorized intentional tort of its agent.^[153] In determining whether

the conduct of the employee is within the scope of his or her employment, courts will consider such factors as whether or not the act is one commonly done by employees, whether or not the employer has reason to expect that such an act will be done, and the similarity in quality of the act done to the act authorized.^[154] Acts of agents or employees are within the scope of their employment if such acts were foreseeable, related to, and connected with acts otherwise within the scope of their employment.^[155] An employee acts within the scope of employment unless that employee “totally deviates from his employment for purposes that are entirely personal.”^[156]

The Administrative Law Judge is not persuaded by the Licensee’s argument that it should not be held responsible for the misconduct of local “rogue” management. The planning and overseeing of the Mardi Gras event was within the scope of the local management’s employment. The Licensee sent the managers of the Bloomington Fat Tuesday basic information about the event and placed them in charge of planning and budgeting their location’s celebration.^[157] Local management received vague and conflicting information concerning the Licensee’s expectations for that celebration. On the one hand, local managers were told that it would be a violation of company policy for employees to “engage in or promote” or “encourage” or “condone” lewd behavior,^[158] reminded that they should “stay within the boundaries of good taste,”^[159] informed that the practice of patrons trading beads for certain favors from other patrons was not “condoned” or “allowed,”^[160] and told to post the “proper signage” in plain public view discouraging lewd behavior.^[161] On the other hand, local management was told to continue to throw beads and warned only that “special” beads did not require “favors” (i.e., the exposure of female breasts).^[162] They were further advised that the goal was to “recreate an authentic New Orleans-style celebration at each location” and that they should “Let the Good Times Roll” each year during Mardi Gras, consistent with Fat Tuesday’s motto.^[163] In addition, the Licensee told local management that the Mardi Gras celebration is “wild and colorful,” with its origins in pagan fertility rites, and that they should begin the Mardi Gras festivities on the twelfth night of Christmas and build to “the rollicking finale of Mardi Gras itself.”^[164] The manual available to managers continued to state that, the better the throw of beads by Fat Tuesday employees, “the more ‘favors’ will be displayed to receive it.”^[165] Local managers were also urged to double sales at each location on Mardi Gras.^[166]

It is also evident that the Licensee was aware of the nature of the traditional celebration (e.g., exchanging “favors” for beads) and the potential for it to exceed the “boundaries of good taste.” In fact, the Fat Tuesday establishment located in Tempe, Arizona, was cited for violations involving the exposure of breasts in 1997. Despite this knowledge and its awareness of the lewd behavior associated with traditional Mardi Gras festivities, the Licensee continued to authorize the bead throws and emphasize the importance of the Mardi Gras event to its bar/restaurants. The Licensee did not place its warning/ejection policy in writing, prescribe the precise language to be used on warning signs, or have Fat Tuesday employees discontinue their bead throws. Given the Tempe citation and the fact that Fat Tuesday establishments during the 1980’s had encouraged the display of breasts, it is all the more clear that the Licensee knew of the

risks and needed to take clear and decisive action to ensure that improper displays of nudity did not occur. That did not happen here.

Based upon the record as a whole, it appears that the acts of local management at the Bloomington Fat Tuesday on March 7, 2000, were foreseeable, related to, and connected with acts that were otherwise within the scope of their employment. As a result, it is concluded that the local managers were acting within the scope of their employment. Accordingly, the failure of Fat Tuesday's local managers to exercise meaningful control over the conduct of the patrons and the entertainment can be imputed to the Licensee pursuant to Minn. Stat. § 340A.501, Bloomington City Code § 13.48(d), and the above-cited case law.

In this case, it is ultimately the Council's decision to decide whether the events that transpired at the Bloomington Fat Tuesday on March 7, 2000, warrant the revocation or suspension of the Licensee's liquor license and/or the imposition of a fine. The Administrative Law Judge has restricted herself to determining whether or not certain factual allegations were true or not true and discussing some of the basic legal issues presented by the parties. The Administrative Law Judge has not attempted to weigh the importance of the facts or determine whether any particular set of facts warrants a particular type of discipline. Therefore, no recommendation has been made to the Council on the ultimate question of whether or not the Licensee's license should be revoked or suspended or whether a fine should be imposed. This is consistent with the Administrative Law Judge's understanding of the role she was to perform in this matter.

B.L.N.

^[1] T. 203-04, 310-12; Exs. 1, 42 (Response to Request for Admissions No. 10, 12). References in this Report to "T. [page number.]" refer to the transcript in this matter. References to "Ex. [number]" refer to the exhibits filed in this matter.

^[2] Exs. 5 (Management Agreement at 2), 42 (Response to Request for Admissions No. 12).

^[3] T. 201-02.

^[4] T. 203; Exs. 5 (license application), 42 (Response to Request for Admissions No. 13).

^[5] T. 201.

^[6] T. 203.

^[7] T. 204, 314-15.

^[8] T. 237-38, 284, 328.

^[9] Ex. 42 (Response to Request for Admissions No. 15).

- [\[10\]](#) T. 97, 269.
- [\[11\]](#) T. 95-96, 135, 157, 271.
- [\[12\]](#) T. 265-67, Ex. 45.
- [\[13\]](#) T. 207.
- [\[14\]](#) T. 208, 211-13.
- [\[15\]](#) T. 208-10.
- [\[16\]](#) T. 249-50.
- [\[17\]](#) T. 212-13, 234-35, 250.
- [\[18\]](#) T. 278-79.
- [\[19\]](#) T. 290-92, 294-96, 304.
- [\[20\]](#) T. 136-38, 204, 319-21, 329-30; Exs. 20-21.
- [\[21\]](#) T. 247-48, 317-19; Ex. 20 at p. 4.
- [\[22\]](#) T. 245-46, 251.
- [\[23\]](#) Ex. 20 at 7.
- [\[24\]](#) Ex. 21 at 22.
- [\[25\]](#) See acknowledgments attached to Exs. 20 and 21.
- [\[26\]](#) T. 139-48, 162-63, 217-18, 227-32, 254, 266-67; Ex. 45.
- [\[27\]](#) T. 107.
- [\[28\]](#) T. 109.
- [\[29\]](#) T. 117-18.
- [\[30\]](#) T. 213-15; Ex. 23 (emphasis in original).
- [\[31\]](#) T. 215.
- [\[32\]](#) T. 148-49, 233-34; Ex. 24 (emphasis in original).
- [\[33\]](#) T. 215-17; Ex. 25.
- [\[34\]](#) Exs. 2, 28.
- [\[35\]](#) T. 173-74, 288.
- [\[36\]](#) T. 225-26; Ex. 42 (Response to Request for Admissions No. 18).
- [\[37\]](#) T. 106, 172.

- [\[38\]](#) T. 173.
- [\[39\]](#) T. 172-73.
- [\[40\]](#) T. 174.
- [\[41\]](#) T. 174, 191-95.
- [\[42\]](#) T. 109.
- [\[43\]](#) T. 110, 174.
- [\[44\]](#) T. 156.
- [\[45\]](#) T. 122-23.
- [\[46\]](#) T. 42-43, 85, 131; Exs. 11A-C, 42 (Response to Request for Admissions No. 19).
- [\[47\]](#) T. 44-45.
- [\[48\]](#) T. 129.
- [\[49\]](#) T. 158.
- [\[50\]](#) T. 160.
- [\[51\]](#) T. 116.
- [\[52\]](#) T. 117, 276.
- [\[53\]](#) T. 43, 89.
- [\[54\]](#) T. 40-42, 45.
- [\[55\]](#) T. 65.
- [\[56\]](#) T. 76-79, 88-89.
- [\[57\]](#) T. 78-79, 86; Exs. 11E-F.
- [\[58\]](#) T. 84; Ex. 11G.
- [\[59\]](#) T. 85.
- [\[60\]](#) T. 89-90.
- [\[61\]](#) T. 90.
- [\[62\]](#) T. 92.
- [\[63\]](#) T. 45-47.
- [\[64\]](#) T. 110, 131-32; Ex. 42 (Response to Request for Admissions No. 22).
- [\[65\]](#) T. 47-51, 175-77.

- [\[66\]](#) T. 176-77.
- [\[67\]](#) T. 77-78, 111-12, 133.
- [\[68\]](#) T. 51-52.
- [\[69\]](#) T. 52-53.
- [\[70\]](#) T. 179-81, 190.
- [\[71\]](#) T. 181.
- [\[72\]](#) T. 182.
- [\[73\]](#) T. 53-55, 68.
- [\[74\]](#) T. 55.
- [\[75\]](#) T. 55, 183-84.
- [\[76\]](#) T. 184.
- [\[77\]](#) T. 184.
- [\[78\]](#) T. 55.
- [\[79\]](#) T. 197, 199.
- [\[80\]](#) T. 164, 236, 274-75, 324-25; Ex. 26.
- [\[81\]](#) T. 120-21.
- [\[82\]](#) T. 55, 91, 183.
- [\[83\]](#) T. 56, 90-91, 94, 122, 129-30, 146, 147, 186.
- [\[84\]](#) T. 125, 188-89.
- [\[85\]](#) 151-52, 157-60.
- [\[86\]](#) T. 157-58.
- [\[87\]](#) T. 104.
- [\[88\]](#) T. 104-05.
- [\[89\]](#) T. 57-58, 69-70, 72-73.
- [\[90\]](#) T. 57-58.
- [\[91\]](#) T. 71.
- [\[92\]](#) T. 54.
- [\[93\]](#) T. 80.

[\[94\]](#) T. 62, 186-87.

[\[95\]](#) T. 58-61, 103; Exs. 6-7.

[\[96\]](#) Ex. 26.

[\[97\]](#) T. 60, 118, 126-28, 282-83, 323-25.

[\[98\]](#) T. 61, 100, 167-68; Ex. 6.

[\[99\]](#) T. 161.

[\[100\]](#) T. 169-70.

[\[101\]](#) T. 170.

[\[102\]](#) T. 171, 173.

[\[103\]](#) T. 172.

[\[104\]](#) T. 182-83.

[\[105\]](#) T. 64; Ex. 7.

[\[106\]](#) See Ex. 44 (a D.J. named Chris was used).

[\[107\]](#) T. 128.

[\[108\]](#) T. 97, 282.

[\[109\]](#) T. 163, 281, 338.

[\[110\]](#) T. 219-21, 239, 286.

[\[111\]](#) T. 167. In its post-hearing submissions, the Licensee attempted to provide additional information concerning the plea entered by Mr. Pitre in his criminal case and the disposition of Mr. Rutherford's criminal case. This information was not the subject of testimonial or documentary evidence at the hearing and there was no request to reopen the hearing to receive evidence relating to this issue. Accordingly, this information is not properly considered by the Administrative Law Judge in this matter.

[\[112\]](#) Ex. 42 (Response to Request for Admissions No. 28).

[\[113\]](#) T. 223-25.

[\[114\]](#) T. 251-52, 296-97, 301.

[\[115\]](#) T. 278. In its Reply Brief in this matter, the City alleged that a citation had recently been issued to Fat Tuesday alleging a violation of the liquor laws. This citation was not the subject of testimonial or documentary evidence at the hearing and there was no request to reopen the hearing to receive evidence relating to this issue. Accordingly, this information is not properly considered by the Administrative Law Judge in this matter.

[\[116\]](#) See Transcript of April 24, 2000, prehearing conference at 3-5.

[\[117\]](#) See *In the Matter of the Application of Godfather, Inc.*, OAH Docket No. CITY-85-009-AK (Jan. 1985).

[118] Minn. Stat. §§ 14.55, **340A.415**.

[119] See, e.g., Minn. Stat. §§ 340A.404, 340A.408, 340A.412, 340A.413, 340A.415, and 340A.509.

[120] See, e.g., *Miller v. City of St. Paul*, 363 N.W.2d 806 (Minn. App. 1985).

[121] Minn. Stat. § 462.352, subd. 2.

[122] Bloomington City Charter § 12.12, subd. 6.

[123] Bloomington City Charter § 12.15, subd. 1.

[124] See Bloomington City Code §§13.38 – 13.57.02.

[125] Bloomington City Code §13.48(d).

[126] Bloomington City Code §13.48.01.

[127] *Id.*

[128] *Accord:* Bloomington City Code § 13.36.

[129] Because the Notice of Hearing only alleged that violations occurred on March 7, 2000, the primary inquiry in this case must focus on the 2000 Mardi Gras celebration at Fat Tuesday. However, it is evident based upon the testimony and videotape evidence introduced in this case that virtually identical activities occurred during the 1999 Mardi Gras celebration and that some patrons exposed their breasts during the 1998 Mardi Gras celebration. The City did not specifically rely in the Notice of Hearing on conduct occurring in 1999 and 1998 as a basis for its proposed revocation of the Licensee's liquor license and did not seek to amend the Notice of Hearing to encompass such allegations. However, it is concluded that evidence relating to the 1998 and 1999 celebrations may be relevant to the City Council's consideration of the appropriate sanction in this case. Accordingly, the Findings and Conclusions in this Report address conduct occurring in 1998 and 1999 as well as that occurring in 2000.

[130] Licensee's Post-Trial Brief at 8.

[131] In fact, the City Code does not formally address hearings before the City Council involving proposed disciplinary action against licensees or require referral by the Council to the Office of Administrative Hearings.

[132] T. 5-6.

[133] T. 6.

[134] T. 7.

[135] Minn. R. 1400.7300, subp. 5 (1999) ("[t]he party proposing that certain action be taken must prove the facts at issue . . . unless the substantive law provides a different burden"). See also G. Beck, M.B. Gossman, L. Nehl-Trueman, *Minnesota Administrative Procedure*, §§10.3.1 and 10.3.2 (2d. ed. 1998).

[136] Minn. Rule 1400.7300, subp. 5 (1999).

[137] See, e.g., G. Beck, M.B. Gossman, and L. Nehl-Trueman, *Minnesota Administrative Procedure* §§ 10.3.1 and 10.3.2 (2d ed. 1998); *In re Disciplinary Actions Against Pedley, et al.*, 1993 WL 79588 (Minn. App. 1993) (unpublished); *In re Wang*, 441 N.W.2d 488 (Minn. 1989); *In re Medical License of Friedenon*, 574 N.W.2d 463 (Minn. App. 1998); *In re Insurance Agents' Licenses of Kane*, 473 N.W.2d

869 (Minn. App. 1991), *rev. denied* (Minn. Sept. 25, 1991); *In re Schultz*, 375 N.W.2d 509, 513-14 (Minn. App. 1985). The clear and convincing evidence standard used in attorney disciplinary proceedings is distinguished based upon the unique nature of such proceedings and the “heightened interest [of society] in the outcome of attorney discipline” since it “strikes . . . at the heart of our justice system.” *In re Wang*, 441 N.W.2d at 492 n.5.

[138] City’s Reply Brief at 1.

[139] *Hymanson v. City of St. Paul*, 329 N.W.2d 324, 326 (Minn. 1983), *citing Sabes v. City of Minneapolis*, 265 Minn. 166, 120 N.W.2d 871 (1963).

[140] *Prior Lake Aggregates, Inc. v. City of Savage*, 349 N.W.2d 575, 580 (Minn. App. 1984).

[141] *Sabes v. City of Minneapolis*, 265 Minn. 166, 120 N.W.2d 871, 875 (Minn. 1963).

[142] *Id.*

[143] *Hahn v. City of Ortonville*, 238 Minn. 428, 57 N.W.2d 254, 260 (Minn. 1953).

[144] Bloomington City Code §13.48.01.

[145] *See, e.g., Sabes v. City of Minneapolis*, 265 Minn. 166, 120 N.W.2d 871, 875 (Minn. 1963); *Moskovitz v. City of St. Paul*, 218 Minn. 543, 16 N.W.2d 745, 748 (Minn. 1944); *BAL, Inc. v. City of St. Paul*, 469 N.W.2d 341 (Minn. App. 1991); and *Miller v. City of St. Paul*, 363 N.W.2d 806, 811 (Minn. App. 1985).

[146] Although the hiring of Mr. Rutherford in 2000 and the expected nature of his performance and crowd reaction was not explicitly discussed with Mr. Stuart or others associated with the Licensee, the Licensee was informed by the Bloomington Fat Tuesday general manager in 1999 that a “co-MC” had been hired in 1999 to “fire up the crowd” and that the crowd became “mean” and “rowdy,” thereby providing the Licensee with some notice of the situation.

[147] Bloomington City Code § 13.48(d).

[148] Bloomington City Code § 13.48.01.

[149] Indeed, Jerome Stuart admitted at the hearing that, “[a]s the corporate licensee I have responsibility for everything that happens at a store, without a doubt.” T. 301.

[150] *Sabes v. Minneapolis*, 265 Minn. 166, 120 N.W.2d 871, 878 (Minn. 1963) (where there had been numerous convictions for acts of prostitution solicited on the premises of a licensee’s bar, the licensee could not plead ignorance of the illicit activities by delegating responsibilities to an employee); *Benton v. Minneapolis Tailoring & Mfg. Co.*, 73 Minn. 498, 76 N.W. 265, 266 (Minn. 1898).

[151] *Kasner v. Gage*, 281 Minn. 149, 161 N.W.2d 40, 42 (Minn. 1968). *See also Semrad v. Edina Realty*, 493 N.W.2d 528, 535 (Minn. 1992).

[152] *Semrad*, 493 N.W.2d at 535.

[153] *Id.*, *citing Kasner v. Gage*, 281 Minn. 149, 161 N.W.2d 40 (1968) (sales corporation not liable for its agent’s theft of a competitor’s records because such conduct was neither authorized nor incidental to authorized conduct and, therefore, was not within the scope of the agency.)

[154] *Kasner*, 161 N.W.2d at 42, citing Restatement Agency (2d) §229.

[155] *Fahrendorff ex rel Fahrendorff v. North Homes, Inc.*, 597 N.W.2d 905, 911 (Minn. 1999), *citing Marston v. Minneapolis Clinic of Psychiatry and Neurology*, 329 N.W.2d 306, 311 (Minn. 1982).

^[156] *Reliance Ins. v. Stack*, 289 N.W.2d 71, 75 (Minn. 1979).

^[157] See Ex. 24.

^[158] Ex. 23.

^[159] Ex. 24.

^[160] Ex. 25.

^[161] Ex. 25.

^[162] During the hearing, Mr. Stuart contended that the beads thrown at Fat Tuesday now are “the traditional small beads that [he couldn’t] even put around [his] neck” and that, since 1997, the establishments were told not to order the long 18-inch or 24-inch beads because those have traditionally been the ones used to “entice.” It is clear, however, from the still pictures taken by the Mall of America security officers that beads extending to 18 or 24 inches or longer were being worn by some of the patrons present at the March 7, 2000, celebration. In addition, there is nothing in the Promotional Outline sent to local management banning the ordering of long beads. See Ex. 24.

^[163] Ex. 24.

^[164] Ex. 20 at 3-4.

^[165] *Id.* at 4.

^[166] Ex. 24.